

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1397 OF 2006

Union of Indian (At the instance of)
Directorate of Revenue Intelligence) 3rd/4th)
Floor, Hotel Waldorf, Arthur Bunder Road,)
Colaba, Mumbai – 400 005.) ... Petitioner

Vs.

1. Devendra Ibrampurkar @ Gattu (at)
present detained at Arthur Road Jail,)
Savio Villa, Tony Compound, Near)
Ganesh Mandir, Sahar Village, Andheri)
(East), Mumbai.)
2. State of Maharashtra.)
3. Narcotic Control Bureau, Ballard Estate,)
Mumbai.) ... Respondents

Mr. R.F. Lambay for the petitioner.

Mr. Rajesh D. Bindra for respondent 1.

Mr. B.R. Borulkar, Public Prosecutor for the State.

Mr. D.N. Salvi for respondent 3.

CORAM : SMT. RANJANA DESAI, J.

**DATE ON WHICH THE JUDGMENT
RESERVED : 16TH NOVEMBER, 2006.**

**DATE ON WHICH THE JUDGMENT
PRONOUNCED : 30TH NOVEMBER, 2006.**

JUDGMENT :-

1. Rule. The respondents waive service. By consent of the parties, taken up for hearing forthwith.
2. The Union of India, at the instance of Directorate of Revenue Intelligence (for convenience "the DRI"), Mumbai, has filed this petition under Article 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973 (for short, "the Cr.P.C.").
3. The case of the petitioner is that the petitioner had filed a complaint against certain accused before the Special Court for Narcotic Drugs and Psychotropic Substances cases on the allegation that they had committed offence under sections 22 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "the NDPS Act"), in the year 2000. The trial in respect of the said complaint commenced on 9/2/2004 and is under progress. The said case is numbered as Special Case No.122 of 2000. About 29 witnesses have been examined so far.
4. It is the case of the petitioner that at the time of filing of the said complaint, the role of respondent 1 came to light. However, respondent 1 was not traceable. He could not be, therefore, interrogated. The petitioner subsequently came to know that respondent 1 has been arrested by the Narcotic Central Bureau (for convenience, "the NCB") in

Remand Application No.62 of 2006 and he had been remanded to judicial custody. As the petitioner desired to record his statement in connection with Special Case No.122 of 2000, the petitioner preferred an application in Remand Application No.62 of 2006 being Misc. Application No.165 of 2006 in the Special Court praying that the petitioner's officers may be permitted to take respondent 1 from Arthur Road Jail to the petitioner's office on 26/2/2006 and on 27/4/2006 for recording his statement in connection with Special Case No.122 of 2000. This application was filed on 25/4/2006. The Special Judge by order dated 29/8/2006 rejected the said application. The Special Judge observed that in the complaint filed by the petitioner in NDPS Special Case No.122 of 2000, the name of respondent 1 is neither cited as a witness nor as an accused. He further observed that there is no specific mention as to why the statement of respondent 1 is required to be recorded. He observed that evidence of 29 witnesses had already been recorded and, hence, the prayer of the petitioner cannot be granted. This order is challenged in this petition.

5. I have heard Mr. Lambay, the learned counsel appearing for the petitioner, Mr. Borulkar, the learned Public Prosecutor appearing for the State and Mr. Salvi, the learned counsel for NCB. Mr. Bindra, the learned counsel for respondent 1 has no objection if the petitioner's

application is granted.

6. Mr. Lambay, the learned counsel for the petitioner drew my attention to section 67 of the NDPS Act. He submitted that under section 67 of the NDPS Act, any authorised officer can, during the course of any enquiry in connection with the contravention of any provision of the NDPS Act, call for information from any person, require any person to produce or deliver any document or thing useful or relevant to the enquiry or examine any person acquainted with the facts and circumstances of the case. He submitted that under section 267 (1) of the Cr.P.C. a person lodged in a prison can be produced before the court if it appears to the court that his presence is necessary for answering to a charge or for the purposes of any proceedings or for the purposes of giving evidence. Mr. Lambay contended that there is no bar preventing the criminal court from directing production of an accused and handing over his custody to an investigating agency in the interest of investigation. He submitted that in the present case, huge quantity of Mandrax tablets is seized by the petitioner. The possible involvement of respondent 1 has been stated by the petitioner in its complaint filed in NDPS Special Case No.122 of 2000. He submitted that it is necessary for the petitioner to interrogate respondent 1 and find out whether he is really involved in this case. Respondent 1 appears to

be acquainted with the facts of the present case. Mr. Lambay submitted that till respondent 1's involvement is ascertained, he cannot be arrested and, therefore, for the purposes of recording his statement, his custody ought to have been handed over to the petitioner. Relying on the judgment of this court in Intelligence Officer, DRI v. Amjad Husein Khan & Anr., 2003 All MR (Cri.) 1037, Mr. Lambay contended that the statements of the accused recorded under section 67 of the NDPS Act though are confessional in nature, cannot be said to be hit by Article 20 (3) of the Constitution of India if that person is not an accused at the time of making the statement. Mr. Lambay therefore submitted that the impugned order may be set aside and opportunity may be given to the petitioner to record the statement of respondent 1.

7. Mr. Borulkar, the learned Public Prosecutor, on the other hand, drew my attention to the judgment of the learned single judge of this court (J.N. Patel, J.) in State of Maharashtra v. Yadav Kohachade, 2000 Cri. L.J. 959. He submitted that in a given case, an accused, who is in custody, may be made available to the Investigating Agency for recording his statement. However, for that purpose, necessary permission of the concerned Magistrate will have to be taken and such order should be passed keeping in view, the relevant provisions of the Cri.P.C.

8. Mr. Salvi, the learned counsel appearing for respondent 3 objected to such an order being passed. He took us to the affidavit of Mr. Bhat, the Intelligence Officer of NCB. He submitted that it is wrong on the part of the petitioner to prefer an application in Remand Application No.62 of 2006 because that remand application is in respect of the case of NCB. He submitted that if the custody of respondent 1 is handed over in Remand Application No.62 of 2006 then it could be termed as NCB custody. He drew my attention to the averments made in the affidavit that if such a custody is given to the petitioner and any mishap occurs while respondent 1 is in transit, the entire responsibility will fall on the NCB. Mr. Salvi submitted that NCB has no objection if DRI takes the custody of respondent 1 for recording his statement in their Special Case No.122 of 2000 but his custody cannot be handed over to the petitioner in NCB's Remand Application No.62 of 2006.

9. I have given anxious consideration to the submissions advanced by both sides. Complaint in NDPS Special Case No.122 of 2000 discloses that the accused are involved in illegal drug trafficking. The petitioner has busted a huge racket in which number of persons are involved. Large quantity of Mandrax tablets have been seized. In such situation, in my opinion, the Investigating Agency must be given all

possible help to investigate the offence by legal methods. Unless the Investigating Agency is certain about the involvement of respondent 1, it cannot arrest him. If respondent 1 was earlier available then the petitioner would have called him for interrogation. Since he was not available, the petitioner could not do so. Now respondent 1 is in judicial custody in connection with NCB's Remand Application No.62 of 2006. In such situation, the petitioner cannot be denied the opportunity to interrogate him in connection with NDPS Special Case No.122 of 2000. If opportunity is denied, it will defeat the ends of justice. In this connection, I may usefully refer to two judgments of this court. Though the facts are not identical, these judgments would indicate what should be the approach of this court while dealing with such cases.

10. In *B.S. Rawat, the Assistant Collector of Customs v. Mohmed Azan Khan and others, 1990 Mah.L.J. 582*, the accused were intercepted by the Preventive Collectorate. Heroin was seized from them. They were arrested and produced before the Additional Chief Metropolitan Magistrate, who remanded them to judicial custody till 4/8/1989. On 31/7/1989, an application was made by the authority concerned to the Magistrate for issuance of examination warrant. Since the accused were produced in the meantime before the Additional Sessions Judge, an application was made on 2/8/1989 to the Additional

Sessions Judge who rejected that application. The learned Judge took the view that Section 267 of the Cr.P.C. would not apply to the case in hand and in no event it would enable the court to issue an examination warrant. The learned judge considered section 267(1) of the Cr.P.C. and observed that sub-section (1) of section 267 would not apply to a situation where it is necessary to produce the person for the purposes of investigation, before the agency which is engaged in the investigation. The learned judge then considered sub-section 1 of section 167 of the Cr.P.C. and the relevant provisions of the NDPS Act more particularly section 67 thereof. The learned judge then observed that the offences in life-destroying drugs and economic offences have been on the increase and the smugglers disrupt the economy of the nation and erode the valuable foreign exchange. He further clarified that this aspect cannot be ignored by the courts when considering their own powers and the ever increasing requirement of the changing situation where often the offenders outsmart the Investigating Agency. The learned judge further observed that to say that while in judicial custody, the person against whom serious allegations are being made should never be made available to the Investigating Agency would be to shut out of investigation and put the offenders beyond the reach of the arms of law. Such a narrow construction cannot be placed on the provisions of section 167 which affords a very wide discretion to the Magistrate or

the provisions of NDPS which clothe the Additional Sessions Judge with identical powers. The learned judge further observed that what is frowned upon is police custody beyond fifteen days and what is permitted is any other custody beyond the period of fifteen days. The learned judge clarified that the restriction on the term by limiting it to fifteen days would be only in respect of police custody and not the other custody and in proper cases it would be open to the Magistrate or the Additional Sessions Judge or the Special Court to pass orders remanding the offenders to any other custody besides the police custody. The learned judge also rejected the apprehensions expressed by the respondent therein that if the accused therein was handed over to the Customs Officer, he may be shot or he may be killed. The learned judge expressed that all these apprehensions were unreal and he set aside the order passed by the learned Additional Sessions Judge and directed that the Additional Sessions Judge should grant permission to the Customs Authorities to take the respondents from judicial custody for the purposes of investigation from 11.00 a.m. to 5.00 p.m. and restore them to judicial custody initially for a period of seven days and consider whether any further remand is necessary. It is pertinent to note that this order was made considering the need to facilitate the Investigating Agency to carry out proper investigation.

11. In Yadav Kohachade' case (supra), the police officer who was investigating Crime No.194 of 1999 reported the matter to the Anti Corruption Bureau (for convenience, "the ACB") because the accused offered him a bribe. The ACB laid a trap and arrested the accused and the crime was registered being Crime No.113 of 1999 under the Prevention of Corruption Act. The accused was arrested and produced before the Special Judge. His remand was sought for seven days. He was remanded to police custody till 25/6/1999. Thereafter, he was remanded to further police custody till 28/6/1999. On 28/6/1999, he was produced before the Special Judge and he was remanded to judicial custody and sent to Central Prison, Nagpur. The Investigating Officer in Crime No.194 of 1999 moved an application before the Judicial Magistrate, First Class, Nagpur, for transferring the accused to his custody for the purposes of investigation. The Magistrate sent a letter to the Special Court, Nagpur. In the meanwhile, the prosecution filed application in the court of Judicial Magistrate, First Class, Nagpur, seeking a production warrant of the accused for investigation in Crime No.194 of 1999. On 29/6/1999, the learned Magistrate issued production warrant addressed to the Superintendent of Jail for production of the accused. The Investigating Officer took over the custody of the accused from jail and produced him before Judicial Magistrate, First Class, Nagpur and prayed for his police custody. The

Judicial Magistrate, First Class, Nagpur, granted police custody of the accused for 14 days. Aggrieved by this order, the accused moved the Court of Sessions. The Sessions Court suspended the order of remand passed by the learned Judicial Magistrate, First Class, Nagpur for a period of two days and directed the officer in charge of the police station to restore the position ante to the date of the order dated 29/6/1999. He restored the custody of the accused to the Court. Hence, the Investigating Officer surrendered the accused to the Superintendent of Central Prison, Nagpur. This order of the Sessions Judge was challenged at the Nagpur Bench of this court.

12. This court referred to sections 267 and 269 of the Cr.P.C. and observed that in such cases, it is always better for the prosecution after obtaining an order under section 267 of the Cr.P.C. to approach the court under whose orders a convict or an accused is confined or detained in prison for seeking permission of the concerned court on the basis that the custody of the accused is required for the purposes of proceedings pending before the Court of competent jurisdiction and describe the nature of the proceedings. This court observed that this would avoid unnecessary controversy and in such cases warrant of production issued by the competent authority for the said purposes need not be returned back by the officer in charge of prison. This court

referred to the judgment of this court in B.S. Rawat's case (supra) and observed that "Proceedings" would mean and include an action or prosecution and sometimes as meaning a step in an action and, therefore, it includes all steps taken in furtherance of prosecution i.e. arrest, remand, interrogation and investigation. This court observed that in B.S. Rawat' case (supra), this court had observed that under section 267 of the Cr.P.C., no order can be passed to produce a person for the purpose of investigation before the agency which is engaged in the investigation as in that case, the warrant was sought for production of the accused before the Custom Officer for the purposes of investigation and therefore, it cannot be said that the Magistrate was not competent to issue such a warrant of production of the accused confined or detained in a prison, before him, for the purposes of considering the request of the Investigating Officer to order his detention in police custody. This court then added that it cannot ignore the importance of the fact that investigation has to be done with a sense of urgency and the court should extend all possible assistance to the Investigating Agency, subject to the constitutional right and procedural safeguards available to an accused person, as the sphere of investigation lies in the hands of Investigating Agency.

13. The above judgments make it clear that it is the duty of the courts

to ensure that Investigating Agency is given all opportunities to investigate a crime by legal methods. A court can always issue warrant of production of the accused confined in a prison, before him for considering the request of an Investigating Officer for making the accused available to him for investigation in respect of a case if it is felt that he is acquainted with the facts of that case or may be involved in it. The court will, however, have to ensure that the constitutional rights of the accused are not violated and all procedural safeguards are adhered to. In the light of the above judgments, I feel that it will be in the interest of justice to give the petitioner a chance to carry out necessary investigation by ensuring that respondent 1 is sent to the petitioner's office for a limited period for that purpose. Hence, I pass the following order :

ORDER

14. The impugned order dated 29/8/2006 passed by the Special Judge is quashed and set aside. The Special Judge is directed to ensure production of respondent 1 on production warrant in his court. He should direct the police to take respondent 1 from judicial custody for the purposes of investigation to the office of the petitioner on two consecutive days. Respondent 1 should be taken there with proper

police escort at 11.00 a.m. and he should be restored to judicial custody at 5.00 p.m. on each of these two days. The police should remain at the office of the petitioner from 11.00 a.m. to 5.00 p.m. and provide necessary protection to respondent 1. At 5.00 p.m., the police should restore respondent 1 to judicial custody. Rule made absolute in these terms.

[SMT. RANJANA DESAI, J.]